Supreme Court, U.S.
FILED

01-435 SEP 10 2001

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No. 01-

IN THE

Supreme Court of the United States

DANIEL E. CARPENTER,

Petitioner,

v.

DONALD M. ISRAEL and MARK R. TAYLOR,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In a diversity action alleging breach of an ambiguous contract, the district court (sitting as the trier of fact) refused to draw an adverse inference when the attorney who had negotiated and drafted the disputed agreement was inexplicably *not* called as a witness by his client to testify regarding the intent of the parties and the draftsmanship attendant to the agreement's preparation and execution.

The first question is one of first impression in this Court. The questions presented are:

1. Whether, in a diversity action, the applicability of the "Missing Witness Rule" is governed by State or Federal Law?

2. Whether, if a missing witness was the attorney for the non-producing party and had been previously sued by the opposing party, that necessarily makes the witness "legally unavailable" to the opposing party?

3. Whether this Court should exercise its supervisory power to prohibit such a far departure from the accepted and usual course of judicial proceedings by the district court which threatened to sanction petitioner at the start of the trial if the petitioner's counterclaims were pursued?

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Second Circuit Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Second Circuit for which certiorari is sought is found in Appendix A. The district court opinion issued after trial is found in Appendix B. The district court opinion issued after remand from the Second Circuit is found in Appendix C. The order of the Second Circuit denying rehearing is found in Appendix D. None of the foregoing opinions are published.

STATEMENT OF JURISDICTION

The judgment of the Second Circuit was entered on May 3, 2001. (App. A). The Second Circuit entered an order denying a timely petition for rehearing on June 12, 2001. (App. D).

The jurisdiction of this Court is invoked under 28 U.S.C. § 2101(c).

STATEMENT OF THE CASE

1. Procedural Background

This breach of contract action was filed by the respondents Donald M. Israel ("Israel") and Mark R. Taylor ("Taylor") on March 29, 1995, in the Supreme Court of the State of New York. The action was timely removed by the defendant-petitioner Daniel E. Carpenter ("Carpenter") to the United States District Court for the Southern District of New

York based on diversity of citizenship pursuant to 28 U.S.C. §§ 1332(a)(1) and 1441(a). The parties consented to proceed before a United States Magistrate for all purposes pursuant to 28 U.S.C. § 636(c).

Carpenter then filed a motion for summary judgment on the ground of *res judicata* by virtue of a dismissal with prejudice of the same claims by the same parties entered in a prior Massachusetts state court action. The district court at first denied Carpenter's motion for summary judgment, *Israel v. Carpenter*, 1996 U.S. Dist. LEXIS 6603, but upon reconsideration granted summary judgment in favor of Carpenter. *Israel v. Carpenter*, 1996 U.S. Dist. LEXIS 14570.

Israel and Taylor then appealed, and the Second Circuit vacated the district court's summary judgment order and remanded for further proceedings. *Israel v. Carpenter*, 120 F.3d 361 (2nd Cir. 1997), *cert. denied*, 522 U.S. 1114 (1998). On remand, the district court held a hearing on April 20, 1998, and determined that the instant action was not barred by *res judicata*.

Following discovery, both parties moved for summary judgment. On July 30, 1999, the district court denied both motions but held that the operative language of the parties' agreement was ambiguous and "subject to more than one interpretation," requiring a presentation at trial of "extrinsic evidence, including the conflicting testimony of the parties concerning negotiations that led to the contract."

At the very beginning of the trial, before any evidence was presented, the district court threatened Carpenter with sanctions if he proceeded with his counterclaims and lost, thereby indicating that it had prejudged the counterclaims and giving Carpenter no choice but to withdraw them.

On September 22, 2000, after a 4-day bench trial, the district court – after refusing to apply the Missing Witness Rule – issued its opinion wherein it ruled in favor of plaintiffs Israel and Taylor. (App. B).

Carpenter appealed to the Second Circuit which, in a summary order dated May 3, 2001 (App. A), affirmed the district court's decision as to liability but reversed and remanded as to damages and interest.

Carpenter timely petitioned the Second Circuit for rehearing, which was denied in an order dated June 12, 2001. (App. D).

On September 5, 2001, the district court issued its opinion on remand. (App. C).

Carpenter seeks reversal of the Second Circuit's decision affirming the district court's ruling as to liability.

2. Factual Background

Beginning in the mid-1980's, Carpenter, Israel and Taylor went into business together selling life insurance and qualified retirement plans. For numerous reasons, by 1991 their relationship had disintegrated and they decided to split up. On September 3, 1991, the parties consummated their "business divorce" by executing an agreement (the "Agreement") by which the assets of the corporations through which they conducted business were distributed among the three principals.

The instant action turns entirely on the interpretation of a clause (¶11) in the Agreement that provides for the division

of the parties' respective interests in two entities established to provide insurance agents (such as the parties) with additional compensation opportunities. The district court held that ¶11 was ambiguous and "subject to more than one interpretation and that extrinsic evidence would be admitted to aid in construing it." (App. at 12a).

In sum, Israel and Taylor claim that ¶11 grants them the right to receive a portion of Carpenter's shares in a reinsurance company called Omega Reinsurance Corporation ("Omega"), whereas Carpenter contends that ¶11 was drafted incorrectly by the plaintiffs' attorney, contained numerous mistakes and faulty premises, and therefore did not represent the parties' true intent and understanding.

Thus, the *only* issue at trial was to determine the true intent and meaning of ¶11.

Stephen R. Herbert, Esq. ("Attorney Herbert"), of the New York law firm of Locke & Herbert, was the attorney for Israel and Taylor during the negotiations that led to the execution of the Agreement. Attorney Herbert also drafted the Agreement – including the ambiguous and disputed ¶11.

It was undisputed at trial that Attorney Herbert drafted the Agreement, was intimately involved in the various discussions and negotiations which led to the execution of the Agreement, and performed all of these acts while serving as the attorney for Israel and Taylor.

Yet, inexplicably, Israel and Taylor did not call Attorney Herbert as a witness at trial to bolster their contentions that (1) they owned a portion of Carpenter's Omega shares; and (2) their interpretation of ¶11 was correct considering

that its construction and draftsmanship was allegedly based on Attorney Herbert's and Israel's conversations with various third parties.

At trial, Carpenter contended that, pursuant to the Missing Witness Rule, an adverse inference should have been drawn from the plaintiffs' failure to call Attorney Herbert as a witness to testify regarding the intent of the parties and the draftsmanship attendant to the Agreement's preparation and execution.

The district court refused to apply the Missing Witness Rule, holding that Attorney Herbert was "equally available" to Carpenter (App. at 17a), notwithstanding that (1) Attorney Herbert was the attorney for Israel and Taylor and (2) Carpenter had sued Attorney Herbert's law firm *concerning this very matter* in a previous case.

Carpenter claims that Israel and Taylor failed to meet their burden of proof in this case and that the district court should have (a) drawn an adverse inference against Israel and Taylor for their failure to call Attorney Herbert as a witness, (b) held the ambiguities in ¶11 against them, and (c) ruled for Carpenter.

REASONS FOR GRANTING THE WRIT

I.

WHETHER THE APPLICABILITY OF THE "MISSING WITNESS RULE" IN A DIVERSITY ACTION IS GOVERNED BY STATE OR FEDERAL LAW HAS NEVER BEEN DECIDED BY THIS COURT AND THERE IS A CONFLICT AMONG THE CIRCUITS.

The definitive statement of the Missing Witness Rule was issued by this Court more than a century ago in *Graves v. United States*, 150 U.S. 118 (1893). "The rule . . . is that, if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable." *Id.* at 121. *See also* 2 Wigmore, *Evidence* § 286 at 199 (Chadbourne rev. 1979) ("It is plain that the inference is based, not on the bare fact that a particular person is not produced as a witness, but on his non-production when it would be natural for the party to produce him if the facts known by him had been favorable").

However, since *Graves*, whether state or federal law governs the applicability of the Missing Witness Rule in a diversity action has never been decided. Carpenter petitions this Court to grant the writ and decide the issue once and for all.

Furthermore, there is a conflict among the Circuits on this issue.

At least two Courts of Appeals have expressly reserved judgment on the issue. *See Wilson v. Merrell Dow Pharmaceuticals*, 893 F.2d 1149, 1151 n.3 (10th Cir. 1990) ("we do not address the questions whether state or federal law governs the giving of the missing witness instruction in a diversity suit and whether federal law permits the missing witness inference to be made"); *Jones v. Otis Elevator Co.*, 861 F.2d 655, 659 n.4 (11th Cir. 1988) ("We reach our decision without determining whether state or federal law controls the giving of the missing witness charge in a diversity suit in federal district court").

Some Courts of Appeals have ruled that state law governs. *See Campbell by Campbell v. Coleman Co., Inc.*, 786 F.2d 892, 897-98 (8th Cir. 1986) (applying Missouri law). While in the Seventh Circuit, there appears to be an intra-circuit conflict. *See Doe v. Johnson*, 52 F.3d 1448, 1460 (7th Cir. 1995) (applying Illinois law); *Chicago Coll. Of Osteopathic Medicine v. George A. Fuller, Co.*, 719 F.2d 1335, 1353 (7th Cir. 1983) (applying federal law).

And, of course, several Courts of Appeals have ruled that federal law governs exclusively. *See Sagendorf-Teal v. County of Rensselaer*, 100 F.3d 270, 275 (2nd Cir. 1996) (applying federal law); *Herbert v. Wal-Mart Stores, Inc.*, 911 F.2d 1044, 1048 (5th Cir. 1990), *rhrg denied*, 917 F.2d 559 (5th Cir. 1990) (applying federal law); *Grajales-Romero v. American Airlines, Inc.*, 194 F.3d 288, 298 (1st Cir. 1999) (applying federal law).

The issue is of paramount importance in the instant action because there is a direct conflict between federal and state law regarding the applicability of the Missing Witness Rule.

For example, under federal law in the Second Circuit, "the giving of missing witness instructions is generally a matter left to the *discretion of the trial judge*." *United States v. Caccia*, 122 F.3d 136, 139 (2nd Cir. 1997) (emphasis added). However, pursuant to New York state law, the giving of the instruction is *mandatory* once a party has established (as Carpenter has done in this case) the existence of a witness who can give material evidence and is expected to testify favorably to the opposing party, and the opposing party fails to defeat the request for the instruction by showing that the witness lacks knowledge, is unavailable, or is not under the opposing party's control. *See Trainor v. Oasis Roller World, Inc.*, 151 A.D.2d 323, 326, 543 N.Y.S.2d 61, 63 (1st Dept. 1989), *appeal after remand*, 168 A.D.2d 235, 562 N.Y.S.2d 501 (1st Dept. 1990); *see also People v. Gonzalez*, 68 N.Y.2d 424, 427, 509 N.Y.S.2d 796, 798-99 (1986) ("Under certain circumstances, the failure of a party to produce at trial a witness who presumably has evidence that would 'elucidate the transactions,' *requires* a trial court, upon a timely request, to instruct the jury that an unfavorable inference may be drawn from the failure of the party to call such witness") (emphasis added).

In fact, the Second Circuit has implied that, while it is unclear whether federal or state law applies, if the standards are dissimilar a federal-state decision is necessary. *See Martinelli v. Bridgeport Roman Catholic Diocese*, 196 F.3d 409, 432 (2nd Cir. 1999).

Carpenter contends that a federal court sitting in diversity must apply *state law* when determining the applicability of the Missing Witness Rule if, as in this case, denying the inference would result in different treatment between those

parties suing in state court and those suing in federal court on the same cause of action.[1]

Since there is, in fact, a direct conflict between federal and state law on the applicability of the Missing Witness Rule, the *Hanna* analysis directs that state law is supreme on this issue. *Compare*, *Walker v. Armco Steel Corp.*, 446 U.S. 740, 752 (1979) (holding that *Hanna* does not apply if there is no direct federal-state conflict).

II.

THE FACT THAT A MISSING WITNESS WAS THE ATTORNEY FOR THE NON-PRODUCING PARTY AND HAD BEEN PREVIOUSLY SUED BY THE OPPOSING PARTY NECESSARILY MAKES THE WITNESS "LEGALLY UNAVAILABLE" TO THE OPPOSING PARTY.

In its *Opinion*, the district court refused to apply the Missing Witness Rule and held that Attorney Herbert was equally available to both sides. (App. 17a-18a).

However, Attorney Herbert was not "available" to Carpenter because (1) Attorney Herbert was the attorney *for the plaintiffs* during the negotiations which led up to the

1. While federal courts must apply substantive state law when adjudicating state law claims, *Erie R.R. Co. v. Tomkins*, 304 U.S. 64 (1938), procedural matters are governed by federal law. *Hanna v. Plumer*, 380 U.S. 460, 465 (1965). Whether a particular provision is substantive or procedural for *Erie* purposes is determined by looking to the "twin aims" of the *Erie* doctrine: the discouragement of forum shopping and the avoidance of the inequitable administration of the laws. *Hanna* at 468.

Agreement's execution and obviously had an attorney-client relationship with the plaintiffs; and (2) in a previous case Carpenter had actually sued Attorney Herbert's law firm *on this very matter* and, as a result, Attorney Herbert was clearly in a position to be biased against or hostile towards Carpenter. Under these circumstances, it is clear that Attorney Herbert was not equally available to Carpenter.

"Whether a witness is equally available depends not solely on physical availability or accessibility, but on all the facts and circumstances bearing on the relationship of the witness to the parties." *Sagendorf-Teal v. County of Rensselaer*, 100 F.3d at 275. More specifically,

> [a] witness' availability is not determined solely from his physical presence at the trial or his accessibility to subpoena. Rather, availability also will turn on the witness' relationship to the non-producing party. A witness is unavailable in a practical sense when this relationship is such that it creates bias or hostility against the opposing party.

Jones v. Otis Elevator Co., 861 F.2d 655, 659 (11th Cir. 1988).

Even though Attorney Herbert was accessible to Carpenter by subpoena, Attorney Herbert was both practically and legally "unavailable" to Carpenter because Attorney Herbert had represented Carpenter's adversaries in this case and, in fact, his law firm had been sued by Carpenter in a related case. Given these unique circumstances, it is reasonable to infer that Attorney Herbert would be biased against and/or hostile toward Carpenter, thereby making him both practically and legally "unavailable" to Carpenter.

See United States v. Spinosa, 982 F.2d 620, 632 (1st Cir. 1992) ("A 'missing witness' instruction is therefore proper . . . when an uncalled, but physically available, witness is so clearly favorably disposed to the other party that the witness is considered to be legally unavailable").

The facts and circumstances in this case are particularly compelling for the application of the Missing Witness Rule. There is a missing witness who had a special relationship with the plaintiffs (as their attorney), was the draftsman of the very document upon which the entire litigation was based and who, because he had previously been sued by the opposing party *concerning this very matter*, clearly would have been a hostile witness if deposed and/or called to testify by the opposing party.

On these facts, Attorney Herbert was not "equally available" to Carpenter and an adverse inference should have been drawn by the fact-finder regarding the plaintiffs' failure to call him as a witness. *See also United States v. SAA*, 859 F.2d 1067, 1074 (2nd Cir.), *cert. denied*, 489 U.S. 1089 (1988) ("a witness with a special relationship with the Government [*i.e.*, informant] is not truly 'available' to the defense merely because he is physically available to be called.").

In this case,

> the person not called was or had been the [plaintiffs'] attorney and it might be expected that his testimony, if given, would corroborate that of the [plaintiffs] as to the legal advice given. In such situation it cannot be said that the attorney was as available to [Carpenter] as to the [plaintiffs].

McClanahan v. United States, 230 F.2d 919, 925 (5th Cir.), *cert. denied*, 352 U.S. 824 (1956).

Had the district court drawn an adverse inference from the failure of the plaintiffs to call Attorney Herbert as a witness, the district court would not have been forced to engage in speculation regarding the parties' true intent and understanding of ¶11. (App. 15a-8a).

The best evidence as to whether ¶11 was truly intended to accomplish what the respondents claim would have been the testimony of its draftsman.

The respondents clearly failed to meet their burden of proof in this case. The district court should have drawn an adverse inference against the respondents, held the ambiguities in ¶11 against them, and ruled for Carpenter.

III.

THE TRIAL COURT DEPRIVED CARPENTER OF DUE PROCESS OF LAW BY IMPROPERLY PREJUDGING HIS COUNTERCLAIMS AND BY THREATENING TO SANCTION HIM IF THEY WERE PURSUED.

"[A] court must strive for 'that atmosphere of perfect impartiality which is so much to be desired in a judicial proceeding.'" *Santa Maria v. Metro-North Commuter R.R.*, 81 F.3d 265, 273 (2nd Cir. 1996) (quoting *Glasser v. United States*, 315 U.S. 60, 82 (1942)).

> In reviewing a challenge to a trial judge's conduct, we determine not "whether the trial judge's

> conduct left something to be desired, or even whether some comments would have been better left unsaid [, but] . . . whether the judge's behavior was so prejudicial that it denied [a party] a fair, as opposed to a perfect, trial."

Shah v. Pan American World Services, Inc., 148 F.3d 84, 98 (2nd Cir. 1998) (quoting *United States v. Rosa*, 11 F.3d 315, 343 (2nd Cir. 1993)).

In the present case, Carpenter was denied a fair trial of his two counterclaims for breach of fiduciary duty and his claim for restitution. The district court's prejudgment of Carpenter's counterclaims is demonstrated by the following interchange that occurred immediately after Carpenter's counsel completed his opening statement which ended with a summary of the counterclaims:

> THE COURT: Well, I would suggest that you press that counterclaim at your own risk, because I don't understand how the release contained in the 1991 agreement doesn't preclude that altogether. And I'm warning you that if you pursue that and do not prevail that you will be sanctioned.
>
> * * *
>
> COUNSEL: If I could briefly address that. I think a careful reading of the release contained in the September 3, 1991 agreement

> reflects that Mr. Carpenter is releasing BCSI, which was Benefit Concepts Systems Inc, and the plaintiffs from all claims for salary reimbursement, anything of value whatsoever, it's of course broad, related to his role as a shareholder, officer, director of BCSI, is the language in the agreement. These claims relate to Mr. Carpenter's role as a shareholder, employee and director of BCNY. Once again, a distinct corporation.

THE COURT: You've heard my warning.

In its remarks, the trial court clearly indicated that it had effectively prejudged the counterclaims and was strongly inclined to rule that respondents' third affirmative defense (that Carpenter's counterclaims were barred by a release contained in the Agreement) was correct. Indeed, the district court's position on this was so hardened that it threatened to sanction Carpenter and/or his counsel if they failed to prevail on the counterclaims. Moreover, Carpenter's counsel's attempt to draw the district court's attention to what at the very least must have been considered an ambiguity in the language of that release fell on deaf ears as the district court responded with the ominous "[y]ou've heard my warning."

The prejudice to Carpenter was compounded by the fact that this was a bench trial, and, therefore, there would be no impartial jury to hear the counterclaims. Thus, Carpenter was forced to weigh the possible negative impact that pursuing

the counterclaims might have on the district court's view of his defense to respondents' case. Placed between the Scylla of withdrawing what he believed to be meritorious counterclaims and the Charybdis of poisoning the sole fact finder's view of his defense (as well as possible sanctions), Carpenter had no real choice but to steer towards Scylla and withdraw the counterclaims.

It was extraordinarily improper for the district court to force Carpenter to make such a decision. If the district court believed the counterclaims had no merit and did not deserve a trial, it should have invited a motion for summary judgment, dismissed them *sua sponte*, or sought some other method to dispose of them before the trial. Threatening Carpenter with sanctions at the end of his opening statement did not comport with traditional notions of fairness and due process.

In fact, the district court's threat to impose sanctions was itself a sanction. Particularly in a bench trial such as this one, a threat of sanctions regarding one issue from the sole trier of fact of all the issues had an improper and chilling effect on Carpenter's desire to pursue his counterclaims.

CONCLUSION

For the foregoing reasons, the Court should grant the petition.

Respectfully submitted,

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APPENDIX

APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND FILED MAY 3, 2001

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 3rd day of May, two thousand one.

PRESENT: HON. DENNIS JACOBS,
HON. FRED I. PARKER,
HON. ROBERT A. KATZMANN,
Circuit Judges.

00-9291

DONALD M. ISRAEL, MARK R. TAYLOR,

Plaintiffs-Appellees,

– v. –

BENEFIT CONCEPTS NEW YORK, INC.,
VOLUNTARY BENEFIT SYSTEMS, INC.,

Defendants,

DANIEL E. CARPENTER,

Defendant-Appellant.

* * *

Appendix A

Appeal from the United States District Court for the Southern District of New York (Magistrate Judge James C. Francis IV).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be affirmed in all respects except as to damages and pre-judgment interest, as to which we vacate and remand for further proceedings.

Daniel Carpenter appeals from the decision of Magistrate Judge James C. Francis IV following a bench trial in the United States District Court for the Southern District of New York, in favor of plaintiffs-appellees Donald Israel and Mark Taylor. Israel and Taylor brought this suit alleging that Carpenter breached a contract among the three parties dividing assets acquired in the course of their business partnership as salesmen of life insurance and qualified retirement plans.

The present dispute turns on the interpretation of a clause ("¶ 11") in the separation agreement that provides for the division of stock held in Carpenter's name. This stock was accumulated as part of an incentive program for insurance agents marketing New England Mutual Life Insurance policies. Israel and Taylor claim, and Carpenter denies, that the agreement provides that each party takes away the portion of stock earned by virtue of that party's sales. The district court concluded that the language of ¶ 11 was ambiguous, conducted an evidentiary hearing, and concluded that the extrinsic evidence weighed in favor of Israel and Taylor.

Appendix A

"Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." Fed. R. Civ. P. 52(a). We may reverse only if we are "left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)).

After a review of the conflicting testimony and evidence, we conclude that the district court's decision to credit Israel and Taylor's interpretation of ¶ 11 and its background over Carpenter's version was not clearly erroneous.

Carpenter attacks the calculation of damages as speculative. As the record contains copies of the checks received by Carpenter as part of the Omega stock repurchase program, along with an accounting of Carpenter's remaining stock, we do not find the calculation speculative. Upon detailed review of the record, however, we do find one error. Carpenter received an initial payment from Omega for $453,411, representing the sale of 4,065 of his 8,000 shares. Carpenter then received six more payments, each representing a portion of his remaining stock. It is uncontested that, had Carpenter properly transferred the stock, Israel and Taylor would have received their portion of the stock on the same schedule. Magistrate Judge Francis used the first such payment to calculate the total amount received by Carpenter. The first payment was $111,221.71, for 20% of the remaining stock; Magistrate Judge Francis therefore multiplied this payment by 5, added it to the initial payment, and arrived at

a total of $1,009,519.55. A better approach would have been to add up: the initial payment, the six subsequent payments, and the remaining Omega stock, arriving at a total of $993,022.58. (Presumably, the difference reflects a small decrease in the value of the Omega stock.) We therefore remand to the district court for re-evaluation of the damages total in light of the money actually received by Carpenter.

As to Carpenter's argument that the district court's calculation of pre-judgment interest was erroneous, we agree. The district court found that the contract was breached on Carpenter's first refusal to transfer the stock to Israel and Taylor, and ruled the interest accrued from that point. *See* N.Y. C.P.L.R. § 5001(b) (McKinney 2001) (providing that "interest shall be computed from the earliest ascertainable date the cause of action existed"). As discussed above, however, Carpenter received the stock in separate payments over several years (as would have Israel and Taylor). In similar circumstances, we have held that a court should use "a reasonable intermediate date during the period in which payments due would have been made" as the starting date for pre-judgment interest. *Esquire Radio & Elecs., Inc. v. Montgomery Ward & Co.*, 804 F.2d 787, 796 (2d Cir. 1986); *see also* § 5001(b) ("Where . . . damages were incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date."). To do otherwise "affords the plaintiff a windfall, and hence penalizes the defendant, in contravention of the compensatory purpose of section 5001." *Esquire Radio*, 804 F.2d at 796. We therefore further remand to the district court for the purposes of amendment of the award in a manner not inconsistent with *Esquire Radio* and § 5001(b).

Appendix A

We have reviewed the remainder of Carpenter's claims and find them without merit.

For the reasons stated above, the judgment of the district court is affirmed in all respects except as to the calculation of damages and pre-judgment interest, as to which we vacate and remand for further proceedings. Costs are awarded to the plaintiffs-appellees.

FOR THE COURT:
ROSEANN B. MACKECHNIE,
CLERK
By:

s/ Lucille Carr
Lucille Carr, Deputy Clerk

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED SEPTEMBER 22, 2000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

95 Civ. 2703 (DAB) (JCF)

DONALD M. ISRAEL and MARK R. TAYLOR,

Plaintiffs,

– against –

DANIEL E. CARPENTER, BENEFIT CONCEPTS NEW YORK, INC., and VOLUNTARY BENEFIT SYSTEMS, INC.,

Defendants.

MEMORANDUM OPINION AND ORDER

JAMES C. FRANCIS IV
UNITED STATES MAGISTRATE JUDGE

This case has a long and rather tortured history that included protracted discovery, substantial motion practice, the dismissal of a related action, and an appeal to the Second Circuit. At its core, however, it involves a relatively straightforward claim for breach of contract. The parties consented to proceed before me for all purposes pursuant to 28 U.S.C. § 636(c), and a bench trial was held on February

28 and 29, March 1, and April 18, 2000. This opinion constitutes my findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

Background

Daniel E. Carpenter, Donald Israel, and Mark R. Taylor first began doing business together in late 1983 or early 1984 through a corporation called Benefit Concepts, Inc., which later changed its name to Benefit Concepts New York, Inc. ("BCNY"). (Tr. 19, 286-88).[1] Together, they engaged in the sale of life insurance and qualified retirement plans. (Tr. 19, 285).

Sometime in about 1985, an entity was formed that later came to be known as the National Financial Marketing Group ("NFMG"). (Tr. 289-90). It was created in order to provide additional income to "super producer" agents and to steer business to The New England, a major insurer. (Tr. 290). Compensation to members consisted of an "expense reimbursement allowance," which was a premium added to initial first year commissions for new, qualifying business. (Tr. 290-91). Benefit Concepts, Inc. became a member of NFMG, making Mr. Carpenter, Mr. Israel, and Mr. Taylor eligible for this additional compensation. (Tr. 32-33, 293-94; Pl. Exh. 23).

Shortly after NFMG was created, its members established a further vehicle for generating income: the

1. "Tr." refers to the trial transcript.

Omega Reinsurance Company ("Omega-Re"). (Tr. 294-95; Def. Exh. 9). Omega-Re would reinsure policies written by its shareholders through The New England. (Tr. 299-300). Thus, as with NFMG, Omega-Re was designed in part to steer business to The New England. (Tr. 299). However, in contrast to NFMG, Omega-Re did not immediately distribute benefits. Rather, the shareholders' stock increased in value over time, allowing participants to defer income and take advantage of the tax consequences. (Tr. 34, 295, 299). Only members of NFMG could become shareholders of Omega-Re. (Tr. 301).

When Omega-Re was created, a unit was established in Mr. Carpenter's name (the "Carpenter Unit"), and Mr. Israel and Mr. Taylor along with Robert Muzikowski were identified as unit members. (Tr. 39-40; Pl. Exh. 30). As each unit member generated qualifying business, it was recorded by Omega-Re according to the member's agent number, and the unit's value would increase accordingly. (Tr. 308, 532-34).

By 1991, the relationship among Mr. Carpenter, Mr. Israel, and Mr. Taylor had soured. (Tr. 113, 203, 317-19). Among other things, Mr. Carpenter contended that Mr. Israel and Mr. Taylor were denying him commissions and expense reimbursements to which he was entitled, while Mr. Israel and Mr. Taylor felt that Mr. Carpenter was attempting to divert corporate assets for his own benefit. (Tr. 242-44, 252, 254, 318).

Recognizing that it would be impossible to continue working together, the parties began the protracted process

of negotiating their "business divorce." This lasted approximately six months and was consummated with an agreement dated September 3, 1991 (the "Buyout Agreement") (Tr. 20-21; Pl. Exh. 1). Among other things, the Buyout Agreement provided for disposition of the parties' interests in NFMG and Omega-Re. The operative paragraph, which is central to the dispute here, reads in full as follows:

> 11. (a) DEC [Daniel E. Carpenter], MRT [Mark R. Taylor] and DMI [Donald M. Israel] acknowledge that BCNY's interest in OMEGA-RE/N.F.M.G. is held in the individual name of DEC who holds the same on behalf of himself and on behalf of MRT and DMI. DEC, MRT and DMI further acknowledge that their individual equity interests (after the adjustments referred to in paragraph (2) above) in OMEGA-RE/N.F.M.G. are accounted for in three sub-accounts.
>
> (b) Upon DEC's termination from OMEGA-RE/N.F.M.G. all three individuals shall receive their individual sub-accounts directly from New England Mutual. Upon written request by MRT and DMI, DEC shall execute any and all assignments and/or other documents necessary for MRT and DMI to receive distribution of their sub-accounts directly from OMEGA. After such distribution, MRT and DMI shall no longer be a part of DEC's "unit" of OMEGA RE/N.F.M.G.
>
> (c) In the event that MRT and/or DMI elect to directly participate (jointly or individually) in

> OMEGA-RE/N.F.M.G. (rather than through DEC), DEC agrees to execute any and all assignments and/or other documents necessary for MRT and/or DMI to individually commence participation in OMEGA-RE/N.F.M.G. with the transfer of MRT's and DMI's interest in OMEGA as reflected in BCNY's/DEC's ownership of stock in OMEGA to the new stock issued to DMI and to be equitably owned by MRT and DMI according to their allocated interests.

(Pl. Exh. 1).

Following execution of the Buyout Agreement, Mr. Israel and Mr. Taylor received permission to establish a separate NFMG unit and buy Omega-Re stock, but they did not immediately seek any allocation of the Carpenter Unit. (Pl. Exh. 9). However, at a shareholder meeting in November 1992, Mr. Israel learned for the first time the value of the Carpenter Unit of Omega-Re as well as the value ascribed to each unit member. (Tr. 44, 48-49). In addition, he learned that payments would likely be made to Omega-Re shareholders in the near future. (Tr. 43-44). Accordingly, on December 22, 1992, Mr. Israel asked that Mr. Carpenter execute documents to transfer the equity of Mr. Israel and Mr. Taylor from the Carpenter Unit to their own. (Pl. Exh. 3). Mr. Carpenter rejected this request (Tr. 46), and in letters to the plaintiffs the following month, he took the position that neither Mr. Israel nor Mr. Taylor ever had an interest in Omega-Re. (Def. Exhs. 15, 16).

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Litigation ensued. In the instant action the plaintiffs, Mr. Israel and Mr. Taylor,[2] argue that it was understood from the outset that they were entitled to a pro rata share of the Carpenter Unit both for purposes of distribution of expense reimbursement allowances and for purposes of allocation of Omega-Re stock. Accordingly, they maintain that paragraph 11 of the Buyout Agreement recognized the status quo and also made provision for separating out the interests of the members of the Carpenter Unit. By contrast, Mr. Carpenter contends that the Buyout Agreement mistakenly treats NFMG and Omega-Re as a single entity. According to Mr. Carpenter, Mr. Israel and Mr. Taylor joined the Carpenter Unit with the understanding that they would receive expense reimbursement allowances through NFMG but that Mr. Carpenter would retain all interest in Omega-Re shares. The language of paragraph 11 of the Buyout Agreement, then, was simply designed to prevent Mr. Carpenter from blackballing Mr. Israel and Mr. Taylor in their efforts to purchase their own shares of Omega-Re; it was not intended to effect a transfer of shares held in Mr. Carpenter's name.

Additional evidence will be discussed in connection with the legal analysis below.

Discussion

New York law governs the plaintiffs' claims of breach of contract. The corporations that were the subject of the

2. During the course of this litigation, Mr. Taylor assigned his claim to Mr. Israel. However, Mr. Taylor has never formally been removed as a party, and I shall therefore treat the plaintiffs' claims separately.

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Buyout Agreement had their principal places of business in New York. (Pl. Exh. 1). Furthermore, the parties have relied upon New York law throughout their submissions. *See Texaco A/S (Denmark) v. Commercial Insurance Co. of Newark, NJ*, 160 F.3d 124, 128 (2d Cir. 1998) (where parties agree to application of forum law, choice of law inquiry is complete). In order to establish a breach of contract under New York law, the plaintiffs must prove: (1) the existence of a contract; (2) performance by the plaintiffs; (3) non-performance by the defendants; and (4) damages resulting from the breach. *See Sauer v. Xerox Corp.*, 95 F. Supp. 2d 125, 128 (W.D.N.Y. 2000); *Marks v. New York University*, 61 F. Supp. 2d 81, 88 (S.D.N.Y. 1999); *Air Support International, Inc. v. Atlas Air, Inc.*, 54 F. Supp. 2d 158, 165 (E.D.N.Y. 1999).

A. *Liability*

1. *Language of the Contract*

The plaintiffs maintain that the language of paragraph 11 of the Buyout Agreement is plain on its face and demonstrates their entitlement to the relief they seek. However, in denying the plaintiffs' motion for summary judgment, I previously rejected this argument, holding that paragraph 11 was subject to more than one interpretation and that extrinsic evidence would be admitted to aid in construing it. (Memorandum and Order dated June 30, 1999 at 5-6). There is no occasion for reconsidering this conclusion.

Nevertheless, the language of paragraph 11 provides far greater support for the plaintiffs' position than for

Mr. Carpenter's. The first sentence of paragraph 11(a) states that "BCNY's interest in OMEGA-RE/N.F.M.G. is held in the individual name of [Mr. Carpenter] who holds the same on behalf of himself and on behalf of [Mr. Taylor] and [Mr. Israel]." (Pl. Exh. 1). According to Mr. Carpenter, all that he held "on behalf of" the plaintiffs was their entitlement to expense reimbursement allowances under NFMG. But if that were the case, the reference to Omega-Re in this sentence would be superfluous.

Similarly, in the next sentence of paragraph 11(a), the parties "acknowledge that their individual equity interests . . . in OMEGA-RE/N.F.M.G. are accounted for in three sub-accounts." (Pl. Exh. 1). In referring to "equity interests" and "sub-accounts," this language seems at least as likely to relate to shares in Omega-Re, an equity-type vehicle, than to NFMG's premium compensation program.

Paragraph 11(b) of the Buyout Agreement provides even stronger support for the plaintiff's interpretation. It requires Mr. Carpenter to "execute any and all assignments and/or other documents necessary for [Mr. Taylor] and [Mr. Israel] to receive distribution of their sub-accounts directly from OMEGA." (Pl. Exh. 1). Thus, it links the "sub-accounts" of the plaintiffs directly to Omega-Re.

Finally, paragraph 11(c) does not, as Mr. Carpenter suggests, merely prevent him from impeding the plaintiffs' purchase of new Omega-Re shares. Rather, it requires him to facilitate the individual participation of Mr. Taylor and Mr. Israel "in OMEGA-RE/N.F.M.G. with the transfer of [Mr. Taylor's] and [Mr. Israel's] interest in OMEGA as

reflected in BCNY's/[Mr. Carpenter's] ownership of stock in OMEGA to the new stock issued to [Mr. Israel] . . . ." (Pl. Exh. 1). Again, the agreement refers to the plaintiffs' ownership interest in existing Omega-Re shares held in Mr. Carpenter's name and distinguishes this from additional shares that the plaintiffs may buy in their own names.

Notwithstanding the text of the Buyout Agreement, Mr. Carpenter contends that because of residual ambiguities, the doctrine of *contra proferentem* applies, and the agreement should be construed against the plaintiffs since their attorney drafted it. This argument misapplies the relevant principles of contract interpretation. In construing a contract, the court's first responsibility is to determine whether material provisions are ambiguous. If that is the case, as it is here, the court does not immediately construe the ambiguities against the drafter. Rather, it must determine whether extrinsic evidence exists that illuminates the intent of the parties. If there is, then resolving the contractual ambiguity is a question of fact for the fact-finder. *See Gallien v. Connecticut General Life Insurance Co.*, 49 F.3d 878, 884 (2d Cir. 1995). Only if no such extrinsic evidence is available does the court resort to the rule of construing any ambiguity against the party who drafted the contract. *See id.*; *see also Kliszak v. Pyramid Management Group, Inc.*, No. 96-CV-0041E(SC), 1997 WL 627638, at *3 (W.D.N.Y. Oct. 1, 1997); *Uniroyal, Inc. v. Home Insurance Co.*, 707 F. Supp. 1368, 1373 (E.D.N.Y. 1988). Here there is ample extrinsic evidence that supports the plaintiffs' interpretation of the Buyout Agreement.

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2. *Negotiations*

Chief among this evidence is proof that during the negotiations Mr. Carpenter was fully aware of the significance of paragraph 11 and nevertheless signed the agreement. On or about July 19, 1991, the plaintiffs forwarded to Mr. Carpenter a draft agreement. (Tr. 324; Def. Exh. 64). That document contained the following provision at paragraph 9:

> [Mr. Carpenter] hereby transfers and assigns all right, title and interest which he has, had, or may have in OMEGA-RE/NFMG Reinsurance Company to BCNY.

(Def. Exh. 64, ¶ 9). On July 24, 1991, Mr. Carpenter responded. With respect to what was then paragraph 9, he said:

> I will retain all the rights, title, and interest I have in OMEGA RE and NFMG. I will, however, be happy to help Mark [Taylor], Don [Israel] and Dave [Muzikowski] establish their own unit with The New England. Out of the goodness of my heart, I have already made arrangements for their new unit to be formed which they would control while I retain the unit which I currently own.

(Def. Exh. 34). Had the plaintiffs wished to acquiesce, the drafting of the relevant paragraph would have been simple: it would have provided that Mr. Carpenter retain all interest in the existing Omega-Re unit and that he assist the plaintiffs'

in establishing their own unit. But that is not what happened. The language of what became paragraph 11 of the Buyout Agreement neither tracks the plaintiffs' initial bargaining position by which they would acquire the entire existing Omega-Re unit, nor does it adopt Mr. Carpenter's opening sally in which he demanded the entire asset. Rather, it embodies a compromise by which Omega-Re would be allocated according to each party's accrued interest in it. That is consistent with the position espoused by Mr. Carpenter on August 29, 1991 that, apart from certain specific transactions, the parties would simply retain their preexisting assets. (Def. Exh. 41). Thus, a review of the process by which paragraph 11 was drafted supports the plaintiffs' interpretation of it.

Mr. Carpenter raises three arguments concerning the drafting process that he contends support his position. First, he maintains that the failure to append to the Buyout Agreement any schedule specifically describing the division of Omega-Re shares demonstrates that this asset was to remain in his name. He points out that other assets that the parties parcelled out were so listed, including shares in BCNY and related corporations, interests in specific accounts, and even physical assets such as personal computers. (Pl. Exh. 1, Schedules A, B, C). However, at the time the Buyout Agreement was entered into, Omega-Re had not notified the parties of the value of their respective interests in the Carpenter Unit; this was not done until the November 1992 shareholders meeting. (Tr. 42-43). Thus, it would have been impossible to include a schedule of the Omega-Re interests as was done with other assets. However, paragraph 11 set forth a procedure for the liquidation and

distribution of the Omega-Re interests that was as detailed as possible under the circumstances.

Second, Mr. Carpenter argues that had the parties truly intended to divide up the Omega-Re shares held in his name, they would have utilized an equitable ownership form that was available from Omega-Re. (Tr. 68-71; Pl. Exh. 11). However, Mr. Israel testified that he was unaware of the existence of such a form until after the Buyout Agreement was executed. (Tr. 69). And, although he provided a copy of the draft agreement to Sheldon Caras, executive director of NFMG, Mr. Caras never suggested a particular form for recognizing the parties' respective interests in Omega-Re. (Tr. 70-71; Def. Exh. 8). It was only after Mr. Israel learned of the existence of the equitable ownership agreement at an NFMG annual meeting at the end of September 1991 that he was able to request such a document. (Pl. Exh. 11). Therefore, the failure to include it with the Buyout Agreement was not significant.

Finally, Mr. Carpenter contends that an adverse inference should be drawn from the plaintiffs' failure to call as a witness Stephen Herbert, the attorney who drafted the Buyout Agreement. "When a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction and fails to produce such witnesses, the [finder of fact] may infer that the testimony, if produced, would be unfavorable to that party." *United States v. Torres*, 845 F.2d 1165, 1169 (2d Cir. 1988) (internal quotations and citations omitted); *see also United States v. Myerson*, 18 F.3d 153, 158 (2d Cir. 1994). However, when the witness is equally available to both sides, no such inference is appropriate.

See United States v. Adeniji, 31 F.3d 58, 65 (2d Cir. 1994). Although Mr. Herbert, a New York City lawyer, was retained by the plaintiffs, they hardly had exclusive control over his availability. There is no indication that Mr. Carpenter ever attempted to locate Mr. Herbert, interview him, take his deposition, or call him as a witness. Under such circumstances, an adverse inference is not warranted. *See United States v. Mittelstaedt*, 31 F.3d 1208, 1215-16 (2d Cir. 1994); *Deler v. Commodore Cruise Line*, No. 92 Civ. 4473, 1995 WL 733655, at *5 (S.D.N.Y. Dec. 12, 1995).

3. *Nominal Ownership*

Mr. Carpenter contends that the plaintiffs' claim that they had an interest in Omega-Re predating the Buyout Agreement is belied by the fact that he held the shares in his own name, in contrast to the parties' interest in NFMG which was held in the name of BCNY. (Def. Exhs. 2, 3). But the plaintiffs explained that they acquiesced in this arrangement because they understood that a corporation could not own shares in Omega-Re. (Tr. 102, 203). They were apparently wrong because neither Omega-Re's corporate resolutions nor its by-laws prohibited corporate ownership of shares at the time the Carpenter Unit was established, and some corporate entities were indeed shareholders from the outset. (Def. Exhs. 4, 5). However, the fact that a corporation could hold Omega-Re shares is immaterial. What is important is the plaintiffs' perception, even if erroneous, that corporate ownership was impermissible since this belief was the basis for their permitting Mr. Carpenter to hold the stock in his own name. Indeed, the plaintiffs' misconception is understandable; even Omega-Re's own treasurer believed that a corporation was prohibited from owning Omega-Re stock. (Tr. 545).

Furthermore, there is no dispute that Mr. Carpenter was the highest-producing agent in the unit and that the production of the other unit members would not have been sufficient on its own to meet qualification thresholds for Omega-Re. Thus, it is not surprising that the shares were held in Mr. Carpenter's name. However, this in no way undermines the plaintiffs' evidence that the parties agreed to share the value of the asset based on their respective levels of production.

4. *Fairness*

Mr. Carpenter also argues that the plaintiffs' interpretation of paragraph 11 of the Buyout Agreement would result in an inherently inequitable agreement and therefore could not have been the intention of the parties. This contention is rather puzzling. The value of the Carpenter Unit of Omega-Re increased based upon the business generated by each of the unit members. By Mr. Carpenter's construction of paragraph 11, the plaintiffs would have ceded to him any increased value in Omega-Re attributable to the reinsuring of policies they were responsible for. That result would indeed have been inequitable. By contrast, the interpretation advocated by the plaintiffs leads to an eminently fair outcome: each unit member receives his proportional interest in Omega-Re. Of course, the Court may not rewrite the contract to achieve equity. The point is rather that to the extent that the parties' intentions were to achieve an equitable division of the assets in which they had an interest, the plaintiffs' construction of paragraph 11 is more consistent with that goal than is Mr. Carpenter's.

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5. *Delayed Assertion of Rights*

Next, Mr. Carpenter contends that the plaintiffs' failure to seek what they now claim to be their share of Omega-Re immediately upon execution of the Buyout Agreement is evidence that they never believed the agreement gave them such an entitlement. It is undisputed that after the Buyout Agreement was signed in September 1991, the plaintiffs waited more than fifteen months to request that Mr. Carpenter transfer to them their claimed interest in Omega-Re.

There are, however, three good reasons for the plaintiffs' delay that are consistent with their view of the Buyout Agreement. First, as discussed above, the plaintiffs did not receive any valuation of their interest in Omega-Re until November 1992 and so had no firm idea of the magnitude of the asset. Second, since the plaintiffs viewed Omega-Re as a long-term, retirement-type investment, they felt no urgency to separate out their interests until November 1992 when it was announced that cash distributions were imminent. Third, in the wake of the business divorce that culminated in the Buyout Agreement, the plaintiffs were understandably reluctant to approach Mr. Carpenter on an issue that could, and ultimately did, create further antagonism.

6. *The Taylor Settlement*

Lastly, Mr. Carpenter argues that Mr. Taylor assigned his claims in this case to Mr. Israel for minimal consideration, and that this is evidence that he understands that these claims are meritless. No such conclusion can be drawn from Mr. Taylor's desire to extricate himself from this litigation.

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In return for assignment of the claims, Mr. Israel agreed to reimburse Mr. Taylor for his share of legal expenses arising out of the case. (Def. Exh. 10). Since the record contains no evidence of what those expenses have been, it cannot be assumed that this consideration is insignificant. Moreover, as part of the settlement, Mr. Taylor received a substantial noneconomic benefit: he reduced the likelihood that Mr. Carpenter would harass him. Mr. Carpenter's conduct toward the plaintiffs and others has often been characterized by threats of retribution whenever someone takes a position that he perceives to be contrary to his interests. (Def. Exh. 15 (threatening "Thermonuclear War," including the solicitation of Mr. Israel's clients); Def. Exh. 16 ("make my day"); Def. Exh. 23; Def. Exh. 47 ("Your letter has cheated me out of money. . . . Please govern yourself wisely"); Def. Exh. 48 ("your wrong-headed support of Don Israel over Dan Carpenter will cost your agency")). Indeed, on February 18, 2000, Mr. Carpenter sent a letter to Mr. Taylor stating in part, "While I really don't care what happens to Don, I felt that in recognition of our past friendship I would give you one last chance to get out before you and your family spend the next 7 years on the wrong side of a lawsuit." (Pl. Exh. 40). In the face of this kind of bullying it would be perfectly rational for Mr. Taylor to assign away his claims for less than their pecuniary value. That assignment therefore has no probative value with respect to interpretation of the Buyout Agreement.

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The plaintiffs have thus established Mr. Carpenter's liability[3] by demonstrating that he entered into the Buyout Agreement, that paragraph 11 requires him to facilitate the plaintiffs' acquisition of the value of their "sub-accounts" in Omega-Re, and that he has defaulted on this obligation. As will be discussed below, the plaintiffs have also proven that this breach resulted in damages to them.

B. *Damages*

In 1993, Mr. Carpenter advised Omega-Re that he wished to redeem all shares in the Carpenter Unit. (Tr. 553, 579; Pl. Exh. 27). In response, the treasurer of Omega-Re initially sent Mr. Carpenter a check on December 23, 1993 for $453,411.00, representing redemption of 4,065 out of a total of 8,000 shares. (Pl. Exh. 29). On November 29, 1994, Omega-Re sent Mr. Carpenter another check, this one for $111,221.71, representing 20% of the value of the Carpenter Unit as of December 31, 1993. (Pl. Exh. 37D). Since that amount was 20% of the total value of the unit, 100% can be calculated by multiplying $111,221.71 by 5, which yields $556,108.55.[4] Thus, the total value of the Carpenter Unit is he sum of its value on December 31, 1993 ($556,108.55) plus the amount of the distribution Mr. Carpenter previously

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3. The plaintiffs did not present evidence that defendants BCNY or Voluntary Benefit Systems, Inc. breached any obligations under the Buyout Agreement.

4. The plaintiffs' calculation of this figure was off by a little less than four dollars, resulting in slight deviations between their figures and those set forth here. (Plaintiffs' Post-Trial Memorandum at 14).

received ($453,411.00). These two numbers added together equal $1,009,519.55.

In order to determine the value of their respective shares, the plaintiffs rely on Omega-Re's historical statements of equity. Mr. Carpenter objects on two grounds. First, although he has not renewed this argument in his post-trial memoranda, he objected at trial that these documents were hearsay and were not properly authenticated as business records. (Tr. 536-42). That objection is unfounded. The records were introduced through Stephen Gucciardi, Omega-Re's treasurer since 1993 and its chief operating officer since 1997. (Tr. 530). He testified that the stock valuation reports were prepared for Omega-Re by the Tillinghast actuarial firm and maintained by Omega-Re in the regular course of its business. (Tr. 537-42). A custodian of a document seeking to authenticate it as a business record under Rule 803(6) of the Federal Rules of Evidence

> need not have personal knowledge of the actual creating on the document, or have been in the employ of the business at the time the record was made. Nor is there any requirement that the records be prepared by the party who has custody of the documents and seeks to introduce them into evidence.

5 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 803.11[1] (2d ed. 2000) (internal quotations and citations omitted); *see also United States v. Williams*, 205 F.3d 23, 34 (2d Cir. 2000) (custodian need not have personal knowledge of creation of document);

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United States v. Jakobetz, 955 F.2d 786, 800-01 (2d Cir. 1992) (creator of document need not testify when document has been incorporated into business records of testifying entity). Thus, the stock valuation reports here were admissible as business records.

Nevertheless, Mr. Carpenter argues that they are unreliable because Tillinghast acknowledged that its calculations in one of the reports were erroneous. (Tr. 538-39). Those errors, however, have been corrected. (Tr. 555, 562, 564-65, 578). Moreover, there is no indication that the mistakes, which affected the reported value of the Carpenter Unit as a whole, had any impact on the accuracy of the reported relative interests of the unit members. Accordingly, the stock valuation reports are properly relied upon.

Thus, based on the Statement of Equity prepared by Tillinghast for the period ending December 31, 1992, the plaintiffs calculate that Mr. Israel has a 23.5% interest in the Carpenter Unit, while Mr. Taylor has a 10.6% interest. The plaintiffs then apply these percentages to the account balance of $1,009,519.55 for the Carpenter Unit as of December 31, 1993, to arrive at principal damage figures of $237,237.08 for Mr. Israel and $107,009.06 for Mr. Taylor.

The defendants have not presented any alternative damage calculation, nor do they contest any specific aspect of the plaintiffs' formula. Rather, they argue only that the damages here are too speculative. This contention is meritless. "[B]reach of contract damages are intended to place a party in the same position as he or she would have been if the contract had not been breached[.]" *Wenger v.*

Alidad, 265 A.D.2d 322, 323, 696 N.Y.S.2d 227, 228 (2d Dep't 1999). Of course, "the damages may not be merely speculative, possible or imaginary, but must be reasonably certain and directly traceable to the breach, not remote or the result of other intervening causes." *Kenford Co. v. County of Erie*, 67 N.Y.2d 257, 261, 502 N.Y.S.2d 131, 132 (1986) (citation omitted). That standard is easily met here. The measure of damages is the value of the asset of which the plaintiffs were deprived, and the method of valuation that they suggest, if not perfect, provides the requisite degree of certainty. Therefore, Mr. Carpenter is liable to Mr. Israel for $237,237.08 and to Mr. Taylor for $107,009.06 in principal damages.

C. *Interest*

In a diversity action, the award of interest is a substantive issue governed by state law. *See Terwilliger v. Terwilliger*, 206 F.3d 240, 249 (2d Cir. 2000). "Under New York law, 'prejudgment interest is normally recoverable as a matter of right in an action at law for breach of contract.' " *Graham v. James*, 144 F.3d 229, 239 (2d Cir. 1998) (quoting *Adams v. Lindblad Travel, Inc.*, 730 F.2d 89, 93 (2d Cir. 1984)). Interest must be computed from "the earliest ascertainable date the cause of action existed. . . ." N.Y. C.P.L.R. § 5001(b). Here the plaintiffs seek interest from January 1, 1993, which is after Mr. Carpenter rejected their demand for a transfer of their proportional interests in Omega-Re. It is thus an appropriate trigger date for interest. Prejudgment interest in New York is awarded at the rate of nine percent per year pursuant to statute. N.Y. C.P.L.R. § 5004. Accordingly, the plaintiffs shall be awarded interest on the principal amount

of damages at an annual rate of nine percent running from January 1, 1993 to the date of judgment.

D. *Attorneys' Fees*

Finally, the plaintiffs seek an award of attorneys' fees. The basis for this request is unclear. First, the plaintiffs argue that they are entitled to fees as a result of Mr. Carpenter's "clear breach of the Buy-Out Agreement." (Plaintiffs' Post-Trial Memorandum at 28). This seems to imply that they seek fees merely as prevailing parties. However, they recognize that fees are not ordinarily recoverable in the absence of statutory authority or a contractual fee-shifting provision. Here, neither the Buyout Agreement nor any applicable statute provides for an award of fees.

The plaintiffs then shift ground and argue that they are entitled to fees because Mr. Carpenter "acted in bad faith, vexatiously, wantonly or for oppressive reasons." (Plaintiffs' Post-Trial Memorandum at 28 (quoting *Fonar Corp. v. Magnetic Resonance Plus, Inc.*, 935 F. Supp. 443, 448 (S.D.N.Y. 1996)). In support of this prong of their argument, the plaintiffs first contend that Mr. Carpenter's bad faith is demonstrated by his failure to abide by his obligations under paragraph 11 of the Buyout Agreement. But this argument conflates the entitlement to fees with the merits of the litigation. As already noted, the plaintiffs may not be awarded fees simply because they have prevailed. Of course, under Rule 11 of the Federal Rules of Civil Procedure sanctions, including attorneys' fees, could be assessed against Mr. Carpenter if he advanced claims or defenses without making reasonable inquiry regarding the relevant law and facts.

However, the plaintiffs have not made any separate Rule 11 motion and, accordingly, have not met the procedural requirements for an award of Rule 11 sanctions.

In the alternative, the plaintiffs argue that Mr. Carpenter's bad faith is demonstrated by his raising an ultimately unsuccessful res judicata defense. This contention relates to the conduct of the litigation rather than to behavior prior to the filing of the complaint and might therefore be the basis for a court to award sanctions pursuant to its inherent authority. *See Bridgestone/Firestone, Inc. v. Recovery Credit Services, Inc.*, 98 F.3d 13, 21 (2d Cir. 1996). However, no such sanctions are warranted here. The factual issues raised by the res judicata defense were serious enough to require an evidentiary hearing. Although the plaintiffs ultimately prevailed, they did not demonstrate that Mr. Carpenter's position was so frivolous as to demonstrate bad faith. Therefore, no attorneys' fees shall be awarded.

Conclusion

For the reasons set forth above, the Clerk of Court shall enter judgment against Daniel E. Carpenter and in favor of Donald M. Israel in the amount of $237,237.08 and against Daniel E Carpenter and in favor of Mark R. Taylor in the amount of $107,009.06, together with interest on each award at the rate of nine percent per year from January 1, 1993 until the date of judgment. The plaintiffs shall be awarded their taxable costs, but their application for attorneys' fees is denied. The complaint is dismissed as to defendants Benefit Concepts New York, Inc. and Voluntary Benefit Systems, Inc. Mr. Carpenter's counterclaims are dismissed.

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SO ORDERED.

s/ James C. Francis IV
JAMES C. FRANCIS IV
UNITED STATES MAGISTRATE
JUDGE

Dated: New York, New York
September 22, 2000

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED SEPTEMBER 5, 2001

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

95 Civ. 2703 (DAB) (JCF)

DONALD M. ISRAEL and MARK R. TAYLOR,

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Defendants.

MEMORANDUM AND ORDER

JAMES C. FRANCIS IV
UNITED STATES MAGISTRATE JUDGE

This case was remanded to me by the Court of Appeals for the Second Circuit for recalculation of damages and interest. Following the remand, counsel made submissions that raise three issues with which I will now deal.

First, the defendant, Daniel E. Carpenter, argues that an evidentiary hearing is necessary for a "full re-evaluation of

damages." I disagree. The Second Circuit did not suggest that the evidentiary record be reopened. Moreover, the issues for which the defendant seeks a hearing have already been decided; the remand was not an invitation for reconsideration of settled matters.

Second, there is some uncertainty regarding the calculation of damages based on the current record. In vacating my analysis of the total value of the assets at issue, the Second Circuit said, "A better approach would have been to add up: the initial payment, the six subsequent payments, and the remaining Omega stock, arriving at a total of $993,022.58." However, it is unclear how the Court of Appeals arrived at its total figure. The initial payment plus the six subsequent payments add up to $724,339.78:

Date of Payment	Amount
Dec. 23, 1993 (Pl. Exh. 37C)	$ 453,411.00
Nov. 29, 1994 (Pl. Exh. 37D)	111,221.71
May 16, 1995 (Pl. Exh. 38C)	37,042.30
May 15, 1996 (Pl. Exh. 38D)	33,508.70
May 15, 1997 (Pl. Exh. 38E)	32,295.37

Appendix C

May 15, 1998 (Pl. Exh. 38F)	$ 29,992.42
May 15, 1999 (Pl. Exh. 38G)	26,868.28
	$ 724,339.78

The only evidence of the value of the remaining Omega stock indicates that it was worth $242,000.00. (Tr. 581). Therefore, the total is $966,339.78, which plaintiffs' counsel concedes is the only amount supported by the record and consistent with the Circuit's methodology. It is from this figure that the plaintiffs' percentage shares (23.5% for Donald M. Israel and 10.6% for Mark R. Taylor) may be derived.

Third, the plaintiffs contend that they should be awarded compound interest. The Second Circuit vacated my interest calculation because the date of accrual that I chose provided a windfall to the plaintiffs. The Court of Appeals did not, however, suggest that simple interest was inappropriate, and I decline to reconsider that determination.

Accordingly, judgment shall be entered in favor of Donald M. Israel and against Daniel E. Carpenter in the amount of $227,089.84 together with simple interest at an annual rate of nine percent calculated from the following accrual dates to the date of judgment:

Appendix C

Principal Amount	Accrual Date
$ 106,551.58	December 23, 1993
26,137.10	November 29, 1994
8,704.94	May 16, 1995
7,874.38	May 15, 1996
7,589.41	May 15, 1997
7,048.22	May 15, 1998
6,314.05	May 15, 1999
56,870.00	May 15, 2000

Judgment shall also be entered in favor of Mark R. Taylor and against Daniel E. Carpenter in the amount of $102,432.01 together with simple interest at an annual rate of nine percent calculated from the following accrual dates to the date of judgment:

Principal Amount	Accrual Date
$ 48,061.57	December 23, 1993
11,789.50	November 29, 1994
3,926.48	May 16, 1995

Appendix C

3,551.92	May 15, 1996
3,423.31	May 15, 1997
3,179.20	May 15, 1998
2,848.04	May 15, 1999
25,652.00	May 15, 2000

Plaintiffs shall be awarded their taxable costs. The complaint is dismissed as to defendants Benefit Concepts New York, Inc. and Voluntary Benefit Systems, Inc. Daniel E. Carpenter's Counterclaims are dismissed. The Clerk of Court shall enter judgment in accordance with this order.

SO ORDERED,

s/ James C. Francis IV
JAMES C. FRANCIS IV
UNITED STATES MAGISTRATE JUDGE

Dated: New York, New York
September 5, 2001

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR PANEL REHEARING DATED AND FILED JUNE 12, 2001

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 12 day of June two thousand one.

Present:

Hon. Dennis Jacobs,

Hon. Fred I. Parker,

Hon. Robert A. Katzmann,

CIRCUIT JUDGES,

Docket No. 00-9291

DONALD M. ISRAEL, MARK TAYLOR,

Plaintiffs-Appellees,

v.

Appendix D

DANIEL E. CARPENTER,

Defendant-Appellant,

BENEFIT CONCEPTS NEW YORK, INC.,
VOLUNTARY BENEFIT SYSTEMS,

Defendants.

A petition for panel rehearing having been filed herein by Daniel E. Carpenter.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is **DENIED.**

FOR THE COURT
ROSEANN B. MACKECHNIE,
Clerk

By: s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney

Supreme Court, U.S.
FILED
NOV 27 2001
OFFICE OF THE CLERK

(2)

No. 01-435

IN THE

Supreme Court of the United States

DANIEL E. CARPENTER,

Petitioner,

v.

DONALD M. ISRAEL and MARK R. TAYLOR,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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Appendix B — Notice Of Appeal Dated October 9, 2001 ..... 4a

STATEMENT OF FACTS AND PROCEDURAL HISTORY

This action, and all of its many, many incarnations, stems from a business divorce between Petitioner Daniel E. Carpenter ("Petitioner") and Respondents Donald M. Israel and Mark R. Taylor ("Respondents"). In 1984, the parties formed Benefit Concepts, Inc. for the purpose of selling life insurance and qualified retirement plans through the New England Mutual Life Insurance Company. By the middle of 1991, the parties' business relationship had completely deteriorated. On September 3, 1991, the parties' formalized their business divorce by executing the Buy-Out Agreement.

The trial in this matter centered on the interpretation of Paragraph 11 of this Agreement, which made provisions for the transfer of the parties' pro-rata interest in shares of stock in the Omega Reinsurance Company which Petitioner held. (Petitioner's App. at 9a). Despite the clear language of Paragraph 11 and Respondents' repeated demands, Petitioner failed to provide Respondents with their respective shares of this stock. Thereafter, Respondents filed suit against Petitioner for, among other things, breach of Paragraph 11.

A Bench Trial was held on February 28 and 29, March 1 and April 18, 2000 before United States Magistrate Judge James C. Francis, IV, of the United States District Court for the Southern District of New York. Prior to the commencement of this trial, and during discovery, neither party sought to subpoena, depose and/or interview the purported draftsman of the Buy-Out Agreement, Respondents' former attorney, Stephen Herbert, Esq. ("Herbert").

Moreover, neither party identified Herbert as a trial witness in the Final Pre-Trial Order submitted to Judge Francis on September 27, 1999. (Respondents' App. A at 2a). During the trial, Petitioner also made no attempts to call Herbert as a witness.

On September 22, 2000, the trial court issued its Memorandum Opinion and Order directing the Clerk to enter judgment against Petitioner and in favor of Respondents in the total amount of $584,124.05. (Petitioner's App. B). In this memorandum opinion, the trial court ruled that the Missing Witness Rule was inapplicable, and that an adverse inference should not have been drawn, because Herbert was equally available to both sides. (Petitioner's App. B. at 17a-18a). The Clerk ultimately entered judgment on September 26, 2000.

Petitioner also declined to raise his counterclaims of breach of fiduciary duty and restitution, simply because the trial court, in an exercise of its discretion and without any indication of prejudgment, warned Petitioner that he would be sanctioned if he did not prevail on said counterclaims.

Petitioner then filed a timely Notice of Appeal of the final judgment entered by the trial court on October 6, 2000, with the United States Court of Appeals for the Second Circuit. (Respondents' App. B). On May 3, 2001, the United States Court of Appeals for the Second Circuit issued its Summary Order affirming the judgment of the trial court in all respects, except as to the calculation of damages and pre-judgment interest. (Petitioner's App. A). The United States Court of Appeals also denied Petitioner's Petition for Panel Rehearing. The Petition to this Court arises from the

Second Circuit's Summary Order,[1] and should be denied for the reasons that follow.

REASONS FOR DENYING THE WRIT

Rule 10 of the Rules of the Supreme Court of the United States provides that, "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." As Justice Frankfurter recounted:

> [I]t is very important that [the Court] be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and of cases in which there is real and embarrassing conflict of opinion . . . [in the lower courts].

---

1. As the trial court noted, "this case has a long and rather tortured history," (Petitioner's App. at 6a), and it is far from any resolution. Upon remand, the trial court recalculated the damages and pre-judgment interest and directed the Clerk to enter judgment in favor of Respondents and against Petitioner in the total amount of $491,639.26. (Petitioner's App. C). The Clerk ultimately entered judgment on September 10, 2001. Petitioner's motion for relief pursuant to Federal Rule of Civil Procedure 60(b) was denied by the trial court, which characterized the motion as "entirely frivolous." Petitioner has appealed the new damage and interest calculations to the Second Circuit. *Carpenter v. Israel, et al.*, U.S. Court of Appeals for the Second Circuit, Docket No. 01-9175 (filed October 9, 2001). And as further evidence of the type of bullying referred to by the trial court, (Petitioner's App. at 21a), Petitioner has caused one of his inactive business entities to file another law suit against Respondents. *Voluntary Benefit Systems, Inc. v. Israel et al.*, U.S.D.C. S.D.N.Y, Case No. 01-CV-8518 (BDP) (filed September 18, 2001).

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 79, 75 S. Ct. 614, 619 (1955) (quoting *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393, 43 S. Ct. 422, 423 (1923) (Taft, C.J.)).

The questions Petitioner presented do not rise to the level of such importance. Petitioner claims the trial court erred by applying the Second Circuit version of the so-called "Missing Witness Rule" rather than the New York version of the rule. Petitioner, however, cannot meet his burden of proving he properly invoked the Missing Witness Rule under either law.

Petitioner also claims his due process rights were violated when the trial court advised him that sanctions would be imposed if Petitioner pursued counterclaims for breach of fiduciary duty and restitution at trial. The trial court, which was fully familiar with Petitioner's intrigues over the many years of litigation, noted the parties' release of claims in the "divorce" agreement and properly issued its admonishment.

For these reasons, and the reasons that follow, Respondents respectfully request this Honorable Court to deny the Petition for a Writ of Certiorari. In the event, the Court grants the Writ, Respondents respectfully contend the following: (1) the Missing Witness Rule has no place in the federal courts since the advent of the Federal Rules of Evidence and the Federal Rules of Civil Procedure or, in the alternative, (2) the Missing Witness Rule is governed by federal law.

I. THIS COURT CANNOT GRANT PETITIONER RELIEF BECAUSE PETITIONER FAILED TO DEMONSTRATE AT TRIAL THE ELEMENTS ESSENTIAL FOR OBTAINING A "MISSING WITNESS" INFERENCE.

Petitioner would not be entitled to a "missing witness" inference under any law, including Petitioner's view of New York law. Therefore, this Court cannot grant the relief Petitioner seeks. Accordingly, the Petition must be denied.

Under federal law, as set forth by the Court of Appeals for the Second Circuit:

> When "a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction" and fails to produce such witnesses, the jury may infer that the testimony, if produced, would be unfavorable to that party. *Graves v. United States*, 150 U.S. 118, 121, 14 S.Ct. 40, 41, 37 L.Ed. 1021 (1893) [other citations omitted]. However, when a witness is equally available to both sides, "the failure to produce is 'open' to an inference 'against both parties.' " [citations omitted]. No instruction is necessary where the unpresented testimony would be merely cumulative. [citations omitted].

United States v. Torres, 845 F.2d 1165, 1169 (2d Cir. 1988). *See United States v. Myerson*, 18 F.3d 153, 158 (2d Cir. 1994). For a witness to be peculiarly in a party's control, the Rule's

proponent has to lack meaningful or pragmatic access to the witness. *United States v. Caccia*, 122 F.3d 136, 139 (2d Cir. 1997). If the witness is equally available, no inference is drawn against the non-producing party. *United States v. Adeniji*, 31 F.3d 58, 65 (2d Cir. 1994). Moreover, courts have been reluctant to find a witness practically unavailable when it appears that the defense had no real interest in calling the witness to the stand and did not make the slightest attempt to locate him or seek out his availability, but instead is engaged in a form of gamesmanship in an effort to obtain a missing witness charge. *Torres* at 1169, *Deler v. Commodore Cruise Line*, No. 92 Civ. 4473, 1995 WL 733655 at *5 (S.D.N.Y. Dec. 12, 1995).

Before and at trial, Petitioner made no effort whatsoever to establish factually an entitlement to the adverse inference. He offered no evidence — no testimony, nor exhibits — to support his application. Indeed, as the trial court aptly noted, "There is no indication that [Petitioner] ever attempted to locate Mr. Herbert, interview him, take his deposition, or call him as a witness." (Pet. App. at 18a). Thus the trial court correctly observed that the Petitioner failed to show Herbert was available and under Respondents' control. Failing these essential prerequisites of the Missing Witness Rule in the Second Circuit, Petitioner was correctly denied use of any adverse inference. *See Russell v. National Railroad Passenger Corporation*, 189 F.3d. 590, 595-96 (7th Cir. 1999) (no basis to request missing witness/evidence charge when proponent never requested the documents in discovery); *United States v. Barton*, 176 F.3d 476 (table), 1999 WL 181682 (4th Cir. 1999) (the fact that alleged co-conspirator was in federal custody in another jurisdiction did not render him unavailable to defendant who could have requested a writ of habeas corpus ad testificandum).

Petitioner's efforts would also fail under New York law. As the New York Court of Appeals observed, the mere failure to produce a witness at trial is insufficient to justify the charge. The proponent must show that the uncalled witness is knowledgeable about a material issue upon which evidence is already in the case; that the witness would naturally be expected to provide non-cumulative testimony favorable to the party who has not called him, and that the witness is available to such party. *People v. Gonzalez*, 68 N.Y.2d 424, 427, 509 N.Y.S.2d 796, 799, 502 N.E.2d 583, 586 (1986).[2]

Moreover, New York requires that the party seeking the inference, or charge, to notify the court as soon as practicable. *People v. Kitching*, 78 N.Y.2d 532, 577 N.Y.S.2d 321, 583 N.E.2d 944 (1991). If this information is available before

---

2. The *Gonzalez* court also set forth the evidence necessary to defeat a request for the adverse inference:

> [T]he opposing party, in order to defeat the request to charge, [must] account for the witness' absence or otherwise demonstrate that the charge would not be appropriate. This burden can be met by demonstrating that the witness is not knowledgeable about the issue, that the issue is not material or relevant, that although the issue is material or relevant, the testimony would be cumulative to other evidence, that the witness is not "available", or that the witness is not under the party's "control" such that he would not be expected to testify in his or her favor. In order to allow for effective judicial review, it is imperative that all discussions regarding this matter be clearly set forth on the record so that the respective positions of each party are readily discernible.

Gonzalez, 68 N.Y.2d at 428, 509 N.Y.S.2d at 799, 502 N.E.2d at 586.

trial, the proponent of the charge must promptly notify the court. Regardless of when the information is available, the issue must be raised so "the court can appropriately exercise its discretion and the parties can tailor their trial strategy to avoid 'substantial possibilities of surprise'." *People v. Gonzalez*, 68 N.Y.2d 424, 427-28, 509 N.Y.S.2d 796, 799, 502 N.E.2d 583, 586 (1986).

Petitioner does not, and cannot, contend that he complied with his notice obligations, a fundamental prerequisite of New York law. The Final Pre-Trial Order ("PTO") in this matter was prepared by the parties and signed by the Court on September 27, 1999, in accordance with the Federal Rules of Civil Procedure. Each party set forth in the PTO the witnesses each intended to call. Mr. Herbert is not listed among the witnesses (for either side). (Respondents' App. A at 2a). At that moment, Petitioner's duty to give notice of his intent to invoke the "Missing Witness Rule" arose, which he failed to do, despite the fact the trial did not commence until February 28, 2000, five months later. There was no notice, and thus New York's law offers no help to Petitioner.

Moreover, Petitioner failed at trial and before this Court to demonstrate that it would have been "natural" for Respondents to present Herbert's testimony. Indeed, his testimony, at best, would have been cumulative and barely relevant. The issue for trial was the parties' intention when they agreed to Paragraph 11 of the Buy-Out Agreement. (Petitioner's App. at 14a). If Herbert was the only person in the world who could testify as to the parties' intent with regard to the Agreement, then it might have been natural to expect Respondents to call him as a witness.

In this matter, however, all of the parties, including Petitioner, had the same, if not greater, amount of knowledge and information needed to accurately testify regarding the parties' intent. Unsurprisingly, all of the parties to the Agreement, Petitioner and Respondents, testified at trial as to their respective intent. As such, Herbert's testimony was unnecessary, *i.e.*, it would not have been "natural" to call Herbert to testify. *Accord Savage v. Thomas J. Shea Funeral Home, Inc.*, 212 A.D.2d 875, 876, 622 N.Y.S.2d 363, 364 (3 Dept. 1995) (in action against funeral home for negligent failure to prepare body for services and burial, plaintiff was not entitled to missing witness charge for defendant's failure to produce employee who assisted employer in the preparation of body because the employee's testimony would have been cumulative to that of the employer who testified).

Indeed, Petitioner admitted at trial that he was actively involved in all of the contract negotiations, was given ample opportunity to review the entire Agreement, and to change any provisions with which he did not agree. (Transcript of Trial before the Honorable James C. Francis, IV, February 29, 2000 at 422, 434-35). Moreover, Petitioner read, initialed and signed the entire Agreement, including Paragraph 11, and conceded that he was completely satisfied with its contents. *Id.* at 422 and 424.

Finally, federal appellate courts "loath" to reverse a trial court's use of the "Missing Witness Rule." *Torres*, 845 F.2d at 1170-71. The decision rests in the sound discretion of the trial court and there is a "deserved reluctance to remove the issue" from the trial court because of the "usual aura of gamesmanship that frequently accompanies requests for a missing witness charge as to which the trial judge will have a surer sense than an appellate court." *Id.*

For the reasons stated above, Petitioner cannot prove entitlement to the benefits of the Missing Witness Rule under either federal or New York law. Accordingly, the Petition for a Writ of Certiorari should be denied.

II. THE MISSING WITNESS RULE IS PROCEDURAL AND GOVERNED BY FEDERAL LAW.

In determining whether federal or state substantive law governs the applicability of the Missing Witness Rule, this Court should adopt the definitive standard set forth in *Herbert v. Wal-Mart Stores, Inc.*, 911 F.2d 1044, 1048 (5th Cir. 1990), *reh'g denied*, 917 F.2d 559 (5th Cir. 1990). The *Herbert* Court conducted an *Erie* analysis and determined that the applicability of state substantive law regarding this rule is not required, pursuant to *Erie v. Tomkins*. *Herbert* at 1048.

In *Erie R.R. Co. v. Tomkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), this Court held that federal courts must apply state substantive law when adjudicating state law claims. Federal law, however, must be applied when adjudicating procedural matters. *Hanna v. Plummer*, 380 U.S. 460, 465, 85 S. Ct. 1136, 1140, 14 L. Ed. 8 (1965). Whether a particular provision is substantive or procedural for *Erie* purposes is determined by looking at the twin aims of the *Erie* Doctrine: 1) the discouragement of forum shopping; and 2) the avoidance of inequitable administration of the laws. *Id.* at 468, 85 S. Ct. at 1142.

With regard to forum shopping, it is almost impossible to conceive a situation in which the Missing Witness Rule would affect a party's choice to sue in or remove an action to federal court. *Herbert* at 1048. With regard to the second aim, the Missing Witness Rule is not bound up with

the definition of the rights and obligations of the parties under state law, so that denying the inference would result in different treatment between those parties suing in federal court and those in state court. *Id.* In fact, the Missing Witness Rule bears no more relation to the elements of a state law claim or defense than any other evidence from which the fact finder may infer an evidentiary or ultimate fact. *Id.*

In this federal diversity action, the Missing Witness Rule had absolutely no place, as is it clearly a procedural matter. The trial took place in a federal court. Accordingly, the procedures and methods used by the trial judge to manage this federal trial, which include the decision to render inferences and/or specific charges regarding the Missing Witness Rule, were governed not by state substantive law, but by the Federal Rules of Civil Procedure and Rules of Evidence.

For these reasons, no other conclusion can be made, except that the Missing Witness Rule is properly classified as procedural and that federal law governs its applicability in this matter. Accordingly, the Petition should be denied.

III. THE "MISSING WITNESS RULE" HAS NO PLACE IN FEDERAL COURTS.

For the reasons set forth at length in *Herbert v. Wal-Mart Stores, Inc.*, 911 F.2d 1044, 1045-48 (5th Cir. 1990) (*dicta*), *reh'g denied*, 917 F.2d 559 (5th Cir. 1990) and noted in *Jones v. Otis Elevator Co.*, 861 F.2d 655, 660 n.4 (11th Cir. 1988) (*dicta*), Respondents respectfully contend that the "Missing Witness Rule" has no place in the federal courts. As the Fifth Circuit noted, the "evidentiary scheme created by the Federal Rules of Evidence, as complimented by the Federal Rules of

Civil Procedure, renders [the rule] an anachronism." *Herbert*, 917 F.2d at 1048, *Accord Allstate Ins. Co. v. Shuler*, 53 F.3d 331 (table), 1995 WL 258139 (6th Cir. 1995) (without discussion, citing *Herbert*).

IV. THE COURT SHOULD REJECT PETITIONER'S INVITATION TO CREATE A PER SE RULE FOR AN OPPONENT'S FORMER ATTORNEY AND PETITIONER'S FORMER LITIGATION ADVERSARY.

It is entirely inappropriate for this Court to establish a per se rule whereby an opponent's former attorney and the proponent's former litigation adversary would automatically be considered "unavailable" under the Missing Witness Rule. Petitioner has not offered any precedent, or statutory authority, to establish the existence of such a rule. No such authority exists. Moreover, both the trial and appellate courts had a clear opportunity to determine whether such a rule existed and, if so, whether it should have been applied in this matter. Both courts, however, deemed it completely unnecessary to make such a determination. *See Torres*, 845 F.2d at 1171 (citing McCormick, On Evidence § 272 at 807 ("a practice which gives a party a right to [a missing witness] instruction is undesirable")). *See United States v. Barton*, 176 F.3d 476 (table), 1999 WL 181682 (4th Cir. 1999) (even though alleged co-conspirator would likely assert a Fifth Amendment privilege, no missing witness charge was warranted because the likelihood did not place it particularly in the Government's power to produce the witness), *United States v. Fermin*, 208 F.3d 223 (table), 2000 WL 203794 (9th Cir. 2000) (request for missing witness charge denied because the witness never actually took the Fifth Amendment and was never subpoenaed). Accordingly, it would be

inappropriate for this Court to now create a new rule regarding Herbert's unavailability. The Petition, therefore, must be denied.

V. PETITIONER WAS NOT DENIED A FAIR TRIAL BECAUSE THE TRIAL COURT NEVER PRE-JUDGED HIS COUNTERCLAIMS.

The conduct of a fair trial is left to the sound discretion of the trial judge and an appellate court should not retroactively substitute its judgment for that of the trial judge, unless there has been an abuse of discretion. *Stich v. United States*, 730 F.2d 115,119 (3d Cir. 1984), *cert. denied*, 496 U.S. 917, 105 S. Ct. 294, 83 L. Ed. 2d 229 (1984); *Excel Handbag Co. v. Edison Bros. Stores, Inc.*, 630 F.2d 479 (5th Cir. 1980).

In this matter, absolutely no evidence exists in the record to support Petitioner's belief that the trial court pre-judged his counterclaims. At trial, the Judge, in an exercise of his discretion over the conduct of a trial, simply told Petitioner's counsel that, based on the clear language of a release contained in paragraph 26 of the Agreement, (Petition at 13), counsel should be careful in wasting the Court's time by raising these counterclaims. Moreover, the trial court also told Petitioner's counsel that they could raise their counterclaims, but would be sanctioned only if they do not prevail. (Petition at 13). The trial court never stated, nor indicated, that Petitioner would not prevail.

In making this argument, however, Petitioner asks this Court to re-write history. He wants this Court to undo *his choice* of withdrawing his counterclaims, because he now realizes that such a choice may have been incorrect. Since

he has no valid justification to make such a request, he is now relegated to brazenly portraying the trial court as unjust and biased towards him.

Finally, the trial court did not create the Scylla and Charybdis. Instead, Petitioner concocted this imaginary hazard to further support his flawed claims against the trial court. The trial court never told Petitioner what course his choice had to take, or that he would not prevail. He was free to withdraw his counterclaims, or to simply convince the trial court that they were meritorious. The fact that Petitioner voluntarily chose to withdraw counterclaims, which he obviously thought had no merit, does not create the equivalent of the Trial Court forcing him to crash into a rock with a sea monster on it.

Based on the foregoing facts, it is clear that the trial court did not prejudge Petitioner's counterclaims. This Court, like the United States Court of Appeals for the Second Circuit, should disregard Petitioner's rational for not raising the counterclaims and treat it for what it is, utter nonsense.

CONCLUSION

For the foregoing reasons, Respondents Donald M. Israel and Mark R. Taylor respectfully request that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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BENJAMIN BENSON

APPENDIX

APPENDIX A — EXCERPTS FROM FINAL PRETRIAL ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED SEPTEMBER 27, 1999

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 95-2703
(DAB)(JCF)

DONALD M. ISRAEL and, MARK R. TAYLOR,

Plaintiff,

v.

DANIEL E. CARPENTER, BENEFIT CONCEPTS NEW YORK, INC. and VOLUNTARY BENEFIT SYSTEMS, INC.,

Defendants.

FINAL PRETRIAL ORDER

The parties having conferred among themselves with the Court pursuant to F.R.C.P. 16, now therefore the following statements, directions, and agreements are adopted as the Pretrial Order herein:

1. *JURISDICTION — VENUE*:

This action is brought pursuant to 28 U.S.C. section 1332.

Appendix A

2. *JURY/NON-JURY*:

The parties have agreed to waive trial by jury.

The parties have agreed that the Honorable James C. Francis IV will conduct all proceedings in the case pursuant to 28 U.S.C. Sec. 636(c).

* * *

[15] * * *

7. *WITNESSES*:

Plaintiffs:
Donald M. Israel
Steven Gucciardi or another representative from The New England
Mark Taylor
Kenneth Murrell (By deposition)

Defendants:
Daniel Carpenter
Molly Carpenter
John Olson
Donald Israel
Mark Taylor (By deposition)
Kenneth Murrell (By deposition)
Jack Robinson

* * *

Appendix A

[23] 13. MODIFICATION OF ORDER. IT IS ORDERED that the Court may in order to prevent manifest injustice or for good cause shown, at the trial of the action or prior thereto upon application of counsel for each party, made in good faith, or upon motion of the court, modify this Pretrial Order upon such condition as the Court may deem just and proper.

s/ Woody Hong
Attorney for Plaintiff

s/ Seth Marcus
Attorney for Defendant

SO ORDERED.

JAMES C. FRANCIS, IV
UNITED STATES MAGISTRATE
JUDGE

Dated: September 27, 1999
New York, New York

APPENDIX B — NOTICE OF APPEAL DATED OCTOBER 9, 2001

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

95 Civ. 2703 (DAB)(JCF)

DONALD M. ISRAEL and MARK R. TAYLOR,

Plaintiffs,

– against –

DANIEL E. CARPENTER, BENEFIT CONCEPTS NEW YORK, INC., and VOLUNTARY BENEFIT SYSTEMS, INC.,

Defendants.

NOTICE OF APPEAL

Notice is hereby given that DANIEL E. CARPENTER, a defendant in the above-named case, hereby appeals to the United States Court of Appeals for the Second Circuit from:

(a) the final judgment entered after remand in this case on September 7, 2001; and

(b) the denial of Carpenter's motion pursuant to Fed. R. Civ. P. 60(b).

Appendix B

Dated: Stamford, CT
October 9, 2001

DANIEL E. CARPENTER,
By his attorney,

s/ Jack Robinson/sm
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(3)

No. 01-435

Supreme Court, U.S.
FILED
DEC 10 2001
CLERK

IN THE

Supreme Court of the United States

DANIEL E. CARPENTER,

Petitioner,

—v.—

DONALD M. ISRAEL and MARK R. TAYLOR,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER

JACK E. ROBINSON
Attorney for Petitioner
Clearwater House
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Other Authority:

Adverse Presumption or Inference Based on Party's Failure to Produce or Examine That Party's Attorney—Modern Cases, 78 A.L.R.4th 571 (1990) 3, 4

This petition is the culmination of a hotly contested business divorce between the petitioner and the respondents which has resulted in seven years of hard-fought litigation. The case began by the respondents dismissing *with prejudice*-in a prior Massachusetts state court action the exact same claims subsequently filed against petitioner in the present New York federal court action. (Pet. at 2).

Having failed to receive the benefit of a dismissal with prejudice, petitioner was then forced to undergo several years of oppressive litigation waged by the respondents in a brazen money grab, wherein they manipulated the ambiguous language in a contract drafted by *their own attorney* to lay claim for themselves to petitioner's Omega stock which petitioner had always owned in his own name and for his own benefit.

At trial, the district court (sitting as the trier of fact) refused to draw an adverse inference that if the draftsman/respondents' attorney had testified, he would have explained that respondents' reading of the contract was incorrect and that petitioner's reading was correct. Instead, the district court engaged in unfounded speculation as to the parties' contractual intent (Pet. at 12a-19a) for the purpose of itself filling gaping holes in the respondents' case culminating in an erroneous ruling against petitioner.[1]

This is a textbook case for the application of the Missing Witness Rule. For this reason, as well as to determine both the applicability of the rule in the federal

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[1] The district court relied on a "compromise" theory (Pet. at 16a) in support of its ruling that petitioner willingly gave up his Omega shares, notwithstanding the total lack of evidence to support such a finding. This is a key reason why hearing the testimony of the contract draftsman was crucial.

courts and the definition of its contours, the petition should be granted.

I.

CERTIORARI IS NECESSARY TO DETERMINE WHETHER THE "MISSING WITNESS RULE" HAS A PLACE IN THE FEDERAL COURTS.

Respondents argue that the Missing Witness Rule "has no place in the federal courts." (Resp. Br. at 11). They base this contention on dicta issued by the Fifth and Eleventh Circuits. However, since only *this* Court can make such a determination, the petition should be granted.

In *Herbert v. Wal-Mart Stores, Inc.*, 911 F.2d 1044 (5th Cir.), *rhrg denied*, 917 F.2d 559 (5th Cir. 1990), the Fifth Circuit referred to the Missing Witness Rule as "an anachronism" and opined that "there is no justification for perpetuating the [rule] in civil cases." *Id.* at 1048. However, even though it was explicitly invited by the panel to rehear *Herbert* en banc,[2] the Fifth Circuit declined to do so. Thus, it is unclear whether the Fifth Circuit as a whole would agree that the rule lacks applicability.

The Eleventh Circuit also questioned the rule's "application under the Federal Rules of Evidence." *Jones v. Otis Elevator Co.*, 861 F.2d 655, 659 n. 4 (11th Cir. 1988). Both *Herbert* and *Jones* are in direct opposition to authorities cited by petitioner (Pet. at 7-8) demonstrating the rule's continued vitality in other circuits.

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[2] "As a panel, therefore, we do not undertake to overrule the cases that rely on the rule, but merely call its archaism to the attention of the Court for possible consideration en banc." *Id.* at 1049.

Notwithstanding dicta issued by the Fifth and Eleventh Circuits, only this Court can determine—with finality—the applicability of the Missing Witness Rule and define the rule's contours. "This Court has supervisory power over the federal courts, and [it] may use that authority to prescribe rules of evidence and procedure that are binding in those tribunals." *Dickerson v. United States*, 530 U.S. 428, 437 (2000) (Rehnquist, C.J.).

Unless and until this Court rules on the applicability of the Missing Witness Rule in the federal courts, and whether the rule is governed by federal or state law,[3] there will continue to be uncertainty and conflicting decisions on the subject throughout the circuits. *See* Pet. at 7.

II.

IF THE MISSING WITNESS RULE IS DEEMED TO BE APPLICABLE IN THE FEDERAL COURTS, THIS COURT SHOULD DEFINE THE RULE'S CONTOURS.

If this Court deems that the Missing Witness Rule is applicable in the federal courts, the contours of the rule should be defined because "[t]he rule by its terms provides a great deal of latitude in determining whether an adverse inference is warranted under a given set of circumstances." Alan Stephens, Annotation, *Adverse Presumption or Inference Based on Party's Failure to Produce or Examine That Party's Attorney—Modern Cases*, 78 A.L.R.4th 571, 575 (1990). The need for the

[3] Petitioner contends that the rule is governed by state law (Pet. at 8-9), whereas respondents argue that federal law governs. (Resp. Br. at 10-11). That the issue has never been decided by this Court warrants the granting of certiorari.

Court's guidance in this area is particularly compelling given the unique circumstances of the present case—*i.e.*, the missing witness was the opposing parties' attorney who drafted the disputed and ambiguous contract.

Respondents argue that a *per se* rule regarding the "legal unavailability" of a witness should not be adopted. (Resp. Br. at 12). However, given the level of confusion and number of conflicting decisions throughout the lower courts on this issue, a *per se* rule or similar pronouncement by this Court would, under the circumstances, facilitate the uniform administration of the laws in the federal courts.

Since "[w]hether a witness is equally available depends not solely on physical availability or accessibility, but on all the facts and circumstances bearing on the relationship of the witness to the parties," *Sagendorf-Teal v. County of Rensselaer*, 100 F.3d 270, 275 (2nd Cir. 1996), this Court should not hesitate to hold that if the missing witness is (or was at relevant times) the opposing party's attorney—and all of the other requirements for the Missing Witness Rule are met—the witness is by definition "legally unavailable" to the party seeking the inference.[4]

Such a ruling with respect to a missing attorney witness is particularly appropriate since it is likely that "the client would have called the attorney to testify, except that the client either knew or feared that counsel's testimony would have been unfavorable." Stephens, Annotation, 78 A.L.R.4th at 579. Moreover, in light of the attorney-client privilege, attorney work product doctrine, and ethical rules regarding client confidentiality, an attorney witness for one party can safely be deemed

[4] In this case, the missing witness had also been sued previously by the petitioner on this very matter, thereby making him even more "legally unavailable."

"unavailable" *per se* to the opposing party for purposes of the Missing Witness Rule.

III.

PETITIONER ESTABLISHED AT TRIAL ENTITLEMENT TO A MISSING WITNESS INFERENCE.

Respondents mischaracterize the "notice" requirement under New York law for obtaining a missing witness charge. *See* Resp. Br. at 7-8. "The New York Court of Appeals has stated that a request for jury instructions is timely if made before the jury begins its deliberations." *Rice v. Hoke*, 846 F.2d 160, 164 (2nd Cir. 1988). Since the present case was a bench trial, petitioner satisfied his "notice" requirement by notifying the trial court prior to the court's deliberations that petitioner sought a missing witness inference. (Pet. at 17a).

Respondents also mischaracterize the New York Missing Witness Rule generally. (Resp. Br. at 7). The New York Court of Appeals has stated that:

> The burden, in the first instance, is upon the party seeking the charge to promptly notify the court that there is an uncalled witness believed to be knowledgeable about a material issue pending in the case, that such witness can be expected to testify favorably to the opposing party and that such party has failed to call him to testify . . . Once the party seeking the charge has established prima facie that an uncalled witness is knowledgeable about a pending material issue and that such witness would be expected to testify favorably to the opposing party, it becomes incumbent upon the opposing party, in order to defeat the request to charge, to account for

> the witness' absence or otherwise demonstrate that the charge would not be appropriate.

People v. Gonzalez, 68 N.Y.2d 424, 427-28, 502 N.E.2d 583, 509 N.Y.S.2d 796 (1986). Thus, after petitioner met his burden of demonstrating entitlement to an adverse inference, the burden shifted to respondents who failed to meet their burden.

Furthermore, contrary to respondents' argument (Resp. Br. at 8-9), there can be no doubt whatsoever that Attorney Herbert—had he been called as a witness—would have provided uniquely relevant and non-cumulative testimony regarding the parties' overall intent regarding the disputed provisions of the contract. In fact, as the contract's draftsman, Attorney Herbert could have elucidated the disputed language that the district court found was ambiguous and "subject to more than one interpretation." (Pet. at 2). Clearly, it would have been preferable for the district court to hear the understanding of the contract's draftsman, particularly because it was faced with contradictory testimony from the parties.

Under these circumstances, the court should have inferred that Herbert's testimony would have been unfavorable to the respondents since they failed to call him as a witness.

CONCLUSION

For the foregoing reasons, the Court should grant the petition.

Dated: Stamford, Connecticut
December 6, 2001

Respectfully submitted,

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